2011

Cloud Enterprises v. Washington City : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

Phillip Cloud; Debra Cloud aka Debbie Cloud; Shawn Cloud; Cloud Enterprises, Inc., an expired corporation; Cloud Moving Co., Inc., a Utah Corporation; and Cloud Family Enterprises, L.L.C., a limited liability Company, Plaintiffs/Appellees, v. Washington City, Craig Maynes, Mike Shaw, Dwayne Isom, Defendants/Appellants.	Case No. 20110175-CA

On interlocutory appeal from an order of the Fifth District Court for Washington County, The Honorable James L. Shumate

REPLY BRIEF FOR APPELLANTS

Justin D. Heideman
HEIDEMAN, MCKAY, HEUGLY & OLSEN
2696 North University Avenue, Suite 180
Provo, Utah 84601
Attorneys for Appellees

Bryan J. Pattison (8766)
Thomas J. Burns (8918)
Jeffrey N. Starkey (5415)
DURHAM JONES & PINEGAR, P.C.
192 East 200 North, Third Floor
St. George, Utah 84770
(435) 674-0400
Attorneys for Appellants

Oral Argument Requested

IN THE UTAH COURT OF APPEALS

Phillip Cloud; Debra Cloud aka Debbie Cloud; Shawn Cloud; Cloud Enterprises, Inc., an expired corporation; Cloud Moving Co., Inc., a Utah Corporation; and Cloud Family Enterprises, L.L.C., a limited liability Company, Plaintiffs/Appellees, v. Washington City, Craig Maynes, Mike Shaw, Dwayne Isom, Defendants/Appellants.	Case No. 20110175-CA

On interlocutory appeal from an order of the Fifth District Court for Washington County, The Honorable James L. Shumate

REPLY BRIEF FOR APPELLANTS

Justin D. Heideman
HEIDEMAN, MCKAY, HEUGLY & OLSEN
2696 North University Avenue, Suite 180
Provo, Utah 84601
Attorneys for Appellees

Bryan J. Pattison (8766)
Thomas J. Burns (8918)
Jeffrey N. Starkey (5415)
DURHAM JONES & PINEGAR, P.C.
192 East 200 North, Third Floor
St. George, Utah 84770
(435) 674-0400
Attorneys for Appellants

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

Other:

REPLY BRIEF FOR APPELLANTS

I. THE CLOUDS CONCEDE SUMMARY JUDGMENT.

Notwithstanding the fact that this Court granted this interlocutory appeal to address the four issues presented in the City's Petition, the Clouds acknowledge only one of them. Conspicuously absent from the Clouds' opposition brief is any effort to defend the various claims that they chose to bring against the City. Rather, the Clouds mention these claims only in passing (at 7-8), barely acknowledging that these are the only claims they have left against the City.

This is, of course, entirely consistent with the Clouds' non-opposition to summary judgment below. The Clouds' failure to engage the City's arguments and to defend their actual claims at any level, either below or on appeal, lends itself to one conclusion: They concede that denial of summary judgment was in error. They concede that their contract claims are meritless and, consequently, that their initial action in obtaining a restraining order against the City on the basis of these contract claims was wrongful. They concede that they never submitted a proper notice of claim as required by the Immunity Act. And they concede that their tort claims are otherwise barred under the substantive provisions of the Immunity Act. Accordingly, and for that reason alone, the Court can and should reverse the trial court's denial of the City's summary judgment motion.

II. RULE 56(f) IS NOT A TOOL TO PROTECT A PARTY FROM LOSING ON SUMMARY JUDGMENT.

As they did below, the Clouds go all-in with Rule 56(f) on appeal. Except now they justify their motion and the trial court's grant of Rule 56(f) relief, as well as its

simultaneous denial of the City's summary judgment motion, on the language in Rule 56(f) that the trial court "may make such other order as is just," Utah R. Civ. P. 56(f). In essence, the Clouds argue that this language vests a trial court with unlimited, unfettered discretion to allow a plaintiff to defeat summary judgment without ever having to address or even justify the claims that the plaintiff brought against the defendant and which are at issue in the defendant's summary judgment motion. Moreover, specific to this case, the Clouds argue that this language vests a trial court with unlimited, unfettered discretion to circumvent the Legislative will and this Court's precedent; to continue to assert jurisdiction over claims to which it has no jurisdiction; and to "allow a full evaluation" of futuristic claims that have not yet "ripened." Rule 56(f) allows no such thing.

As set forth below in Point A, the Clouds' arguments ignore the body of case law governing the qualifications for and appropriate use of Rule 56(f); ignore this Court's holding in *Jensen v. Smith*, 2007 UT App 152, 163 P.3d 657, which disallows what the Clouds sought and obtained; and ignore Rule 56(f)'s plain language which provides that a trial court may make "such other order as is just" not as an end in itself but only after the party seeking the continuance has met its burden of demonstrating that it cannot "present by affidavit facts essential to justify the party's opposition" to summary judgment, *see* Utah R. Civ. P. 56(f)—something the Clouds have never done (and cannot do). Moreover, and on that score, the Clouds' conclusory assertion (at 16) that there are "15 allegations of fact" in the City's summary judgment motion that are "directly affected by the trial court's de novo review of the Fire Board's decision," is sophistry. Thus, in Point

B below, we do what the Clouds do not: We provide those 15 statements to show that there is no chance of them affecting the outcome of summary judgment. In short, the trial court's inclusion of Rule 56(f) in its order does nothing to insulate its improper denial of summary judgment. Rather, summary judgment was appropriate as a matter of law.

A. The Clouds' Interpretation of Rule 56(f) Has No Support in the Language of the Rule or in Case Law Interpreting the Rule.

1. Rule 56(f)'s "such other as is just" language does not vest a trial court with a catch-all, standardless method to deny summary judgment and order the parties to trial.

The Clouds point to Rule 56(f)'s "such other order as is just" language and leap to the conclusion that it must mean that a trial court has absolute and unchecked discretion to "allow a full evaluation of a party's claims." (Cloud Br. at 13.) On that basis—the argument goes—the trial court was within its discretion in denying the City's summary judgment motion and granting a continuance—not so the Clouds could procure the missing affidavit to defeat summary judgment—but so the Clouds can force the City to trial. Not so.

a. An order that protects a party from summary judgment is not "just."

The Clouds cite to no case in which the Utah Supreme Court or this Court have determined the meaning of Rule 56(f)'s "such other order as is just" language. But whatever its outer limits, the Court need not explore it here, because this Court has already held that Rule 56(f) relief is not appropriate—*i.e.*, not just—if it does nothing

more than protect a party from an adverse summary judgment ruling. *See Jensen*, 2007 UT App 152, ¶ 2; *Jones v. Bountiful City Corp.*, 834 P.2d 556, 561 (Utah Ct. App. 1992).

Somewhat remarkably, just as the Clouds refuse to address the merits of their underlying claims, they also refuse to address *Jensen*. Yet, they do not deny that their Rule 56(f) motion sought and obtained what this Court has forbidden: An order protecting them from an adverse summary judgment ruling. *See Jensen*, 2007 UT App 152, ¶ 2.

Moreover, the Clouds do not once justify the trial court's actions in the face of the immunity issues that are the flashpoint of this appeal and the City's summary judgment motion. The Clouds do not explain how an order that circumvents the Legislative will by allowing a trial court to continue to assert jurisdiction over claims for which it does not and has never had subject matter jurisdiction and which are otherwise stillborn as a result of the procedural and substantive provisions of the Governmental Immunity Act is somehow "just."

Indeed, while they cloak themselves in the "such other order as is just" language, the Clouds fail to explain what it means, how to apply it, and where this Court should place the legal limits of what constitutes a "just" order. *See, e.g., State v. Pena*, 869 P.2d 932, 937 (Utah 1994) ("[I]t is our role as an appellate court to define what the law is, and we never defer to any degree to a trial court on that count.").

Nor do the Clouds explain how this unlimited and unfettered discretion works in the face of Rule 56(c) which directs that "[t]he judgment sought *shall* be rendered if the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c) (emphasis added). Quite simply, if summary judgment is warranted, and it is here, it shall be entered. *See Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 18, 183 P.3d 1059 ("Failure to produce acceptable evidence demonstrating a genuine issue of material fact will result in a grant of summary judgment.") (citation and quotation omitted). Consequently, an order cannot be "just" if it avoids what Rule 56(c) demands.

This Court's decision in *Jensen* recognizes this very thing. If summary judgment is warranted, it should be granted. And Rule 56(f) cannot be wielded for no other purpose than to protect a party from an adverse summary judgment ruling. As borne out by the Clouds' brief, that was the only purpose for the inclusion of Rule 56(f) language in the trial court's order in this case.

b. A "just" order under Rule 56(f) is one that sets the limits of discovery for the purpose of opposing summary judgment.

For that reason alone, the Court can dispense with the Clouds' Rule 56(f) arguments. But if the Court desires to further examine the "such order as is just language" in the rule, it will not find the vague and standardless catchall that the Clouds argue justifies denial of summary judgment in favor of a trial for a "full evaluation" of their claims. Rather, it will find that the language is simply a means to impose specific conditions on the party obtaining the Rule 56(f) continuance to conduct discovery.

Specifically, courts interpreting the "such other order as is just" language in Rule 56(f) interpret it as allowing the trial court to impose conditions on the party obtaining a Rule 56(f) continuance which are specific to obtaining information during discovery in order to present an opposition to summary judgment. *See Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F.2d 1260, 1264 n.3 (10th Cir. 1984).[1] "Those conditions have required that discovery be completed within a specified time, that the scope, issues or persons available for discovery be limited, or that the [Rule 56(f)] movant be required to reimburse expenses." *Id.* at n.3 (citing 10A C. Wright & A. Miller, Federal Practice and Procedure Civil 2d § 2740 at 539 (1983)). It also allows for denial of the Rule 56(f) request subject to later application and a more detailed explanation as to why an affidavit in opposition to summary judgment could not be obtained. *See* Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 2740 (3d ed. Westlaw 2011) ("Courts also have withheld action or denied a Rule 56(f) request without prejudice to a reapplication accompanied by a fuller explanation of why affidavits opposing the motion could not be presented.").

This confirms that, contrary to the Clouds' arguments, the "such other order as is just" language in Rule 56(f) is not an end in itself. It follows the requirement that the party seeking Rule 56(f) protection first make a threshold showing that they cannot

[1] "Interpretations of the Federal Rules of Civil Procedure are persuasive where the Utah Rules of Civil Procedure are 'substantially similar' to the federal rules." *Tucker v. State Farm Mut. Auto. Ins. Co.*, 2002 UT 54, ¶ 7 n.2, 53 P.2d 947 (citation omitted). Federal Rule 56(d), which was formerly Federal Rule 56(f), is similar to Utah's Rule 56(f). *See* Utah R. Civ. P. 56 compiler's notes.

presently oppose summary judgment: "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may ... may make such other order as is just." Utah R. Civ. P. 56(f). That is, the opposing party must first identify specific facts that he or she intends to obtain that would preclude entry of summary judgment. *See Overstock.com, Inc. v. SmartBargains, Inc.*, 2008 UT 55, ¶¶ 23-27, 192 P.3d 858. Without that showing, a trial court cannot make "such other order as it just." Rather, the only appropriate order is one denying the Rule 56(f) motion as "futile." *Id.* ¶ 23.

In other words, Rule 56(f) does not allow a trial court to do what the trial court did here, deny summary judgment and force a defendant to trial where the party opposing summary judgment has not bothered to present specific facts to demonstrate that it can, with whatever order the trial court deems "just," obtain the missing affidavit or conduct discovery in order to create a disputed issue of material fact to defeat summary judgment. That is outright protection of the party from a summary judgment ruling—something this Court has made clear is not within the trial court's discretion. *See Jensen*, 2007 UT App 152, ¶ 2.

2. Rule 56(f) is a Device to Identify Specific Facts to Defeat Summary Judgment and then Obtain Those Facts Through Discovery.

The Clouds also take issue with the City's characterization of *Crossland Savings v. Hatch*, 877 P.2d 1241 (Utah 1994). The Clouds assert that *Crossland Savings* does not stand for the proposition that Rule 56(f)'s sole purpose is to allow a party who cannot

present sufficient facts to oppose summary judgment more time to conduct discovery to procure facts to mount an opposition to summary judgment. (Cloud Br. at 13-14.)

Rather, the Clouds assert that in *Crossland Savings*, the Supreme Court reasoned that in ruling on a Rule 56(f) motion the focus should be on the "individual circumstances of each case." (Cloud Br. at 15.) Of course, the Clouds fail to provide the entire passage from the opinion, which provides the necessary context. The Court actually said that "the courts in this state have never established a 'bright line' rule *for determining when a party has had sufficient time to initiate discovery*. Instead, we have focused on the individual circumstances of each case." *Crossland Sav.*, 877 P.2d at 1244 (emphasis added). Indeed, the question in *Crossland Savings* was whether the party seeking Rule 56(f) relief had been dilatory in seeking discovery. *See id.* at 1243-1244. Thus, contrary to the Clouds' assertions, there was no suggestion in *Crossland Savings* that in a complex case (and this is not one)[2] the trial court is free to use Rule 56(f) for whatever purpose serves the needs of the party opposing summary judgment.

In fact—showing once again that *Jensen* marks the path to dispensing with Rule 56(f)—in *Jensen*, this Court rejected the "it's a complex case therefore Rule 56(f) is appropriate" argument. *See Jensen*, 2007 UT App 152, ¶ 5. There, this Court affirmed denial of a Rule 56(f) motion as "dilatory or lacking in merit" where the plaintiff's

---

[2] The Clouds continue to argue that the City agrees that this is a complex case "in the extreme." (Cloud Br. at 15.) That is false. The City does not agree. As set forth in Point III below, the only thing that is complex about this case is the manner in which it has been litigated and morphed at every turn to keep alive claims and procedures that should be (and are) legally dead.

"stated reasons for not being able to produce the necessary evidentiary affidavits were merely that the case was too complex ..." *Id.* ¶ 5. The Clouds have not cited any authority in their brief to show that the rule is any different if the case is a self-described complex case "in the extreme." (Cloud Br. at 15.)

Rather, any sampling of the opinions from either this Court or the Utah Supreme Court reveal that in determining whether Rule 56(f) relief is appropriate, the focus is always on the issue of discovery:

- *Overstock.com, Inc. v. SmartBargains, Inc.*: Affirming denial of Rule 56(f) motion where party "failed to identify in its rule 56(f) motion or its opposition to [moving party's] motion for summary judgment any discovery that would create a material issue of fact which would preclude the granting of a summary judgment motion." 2008 UT 55, ¶ 24, 192 P.3d 858

- *Callioux v. Progressive Ins. Co.*: "To qualify for relief under Rule 56(f), 'the opposing party must show to the best of his [or her] ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to discovery procedures under the Rules; and that [s]he is desirous of taking advantage of these discovery procedures.'" 745 P.2d 838, 840-41 (Utah Ct. App. 1987) (quoting 2 James Wm. Moore et al., Moore's Federal Practice ¶ 56.24 (2d ed.1987))

- *Campbell, Maack & Sessions v. Debry*: instructing the trial court to "examine (1) whether the party submitting the motion is merely attempting to gain 'additional discovery time to uncover purely speculative facts after substantial discovery has already been conducted,' and (2) 'whether the other party has appropriately responded to discovery requests.'" 2001 UT App 397, ¶ 9, 38 P.3d 984 (quoting *Reeves v. Geigy Pharm., Inc.*, 764 P.2d 636, 639 (Utah Ct. App. 1989)).

To be sure, and though we are not aware of a Utah case (and the Clouds provide none), there may be circumstances where something other than discovery warrants Rule 56(f) relief. For example, discovery may not be needed to procure a necessary affidavit.

See, e.g., Utah R. Civ. P. 56(f) (providing that the court may … order a continuance to permit affidavits to be obtained"). One can surmise a situation in which a party opposing summary judgment needs to locate a key witness who has disappeared but can provide the crucial affidavit that will be the direct counter needed to defeat summary judgment.

But even in that case, the continuance is tethered to Rule 56(f)'s express language that the continuance is sought for the purpose of obtaining facts necessary and essential to justify the opposition to summary judgment. *See* Utah R. Civ. P. 56(f). That is, after all, the purpose of Rule 56(f). The rule is summary judgment specific. It requires an explanation in "an affidavit stating reasons why the party is presently unable to submit evidentiary affidavits in opposition to the moving party's supporting affidavits." *Crossland Sav.*, 877 P.2d at 1243. The Clouds cite to no case or other authority suggesting that it is something that allows "a full evaluation of a party's claims"—which in this case is code for "simply deny summary judgment and give us a trial." More importantly, the Clouds cite to no authority that allows a trial court to ignore basic jurisdictional and immunity issues—issues that affect the public health, safety, and welfare—so that a plaintiff can have its day in court. Here, as detailed in the City's opening brief, the Plaintiffs are not entitled to their day in court on the claims that they have chosen to assert against the City.

B. The Facts Are What the City Says They Are: Undisputed.

This brings us to the Clouds' argument that there are "outstanding issues of disputed fact which preclude[]" summary judgment. (Cloud Br. at 15.) The Clouds do

not present a single argument, fact, or otherwise that shows that if they were given a trial—this de novo review—that they could somehow defeat summary judgment. For starters, the trial court already simply denied the City's summary judgment without ever requiring the Clouds to make a single substantive argument in opposition. The Clouds act as though this never happened. It did, and it was error.

In any event, the Clouds argue that "[i]t is clear that the trial court must first complete its review of that [the Fire Board's] determination so that the parties know precisely what the Fire Code's application is in this case." (Cloud Br. at 14.) They do not explain why this is clear. They do not explain how a de novo review of the Fire Board's decision will reverse this Court's decision in *Heideman v. Washington City*, 2007 UT App 11, 155 P.3d 900, and turn their building permit into a contract to save their contract claims. They do not explain how a de novo review of the Fire Board's decision will save them from their failure to file a proper and timely notice of claim—ten years after the fact. Nor do the Clouds explain how a de novo review of the Fire Board's decision will amend the substantive provisions of the Immunity Act to "un-waive" the immunity that the Legislature reserved to the City.

Indeed, while the Clouds demand a trial in order to "fully examine" their claims, they have not once, either below or on appeal, expressed any interest in examining those claims on the merits and against the undisputed facts and arguments advanced by the City. Rather, their brief merely confirms what the City argued below and on appeal: The Rule 56(f) motion was nothing more than an effort to avoid summary judgment and

protect the Clouds from an adverse ruling that is mandated by the undisputed facts and governing law.

The Clouds' steadfast and consistent refusal to address any of these issues on the merits demonstrates that they have no answer to any of these questions. So instead, the Clouds offer up generalities. They argue there are "fifteen (15) allegations of fact" in the City's summary judgment that are "directly affected by the trial court's de novo review of the Fire Board's decision." (Cloud Br. at 15-16.) Then, they jump to the conclusion that these 15 issues "targets core issues that [the Clouds] believe soundly defeats the pending summary judgment motion." (Cloud Br. at 16.) The Clouds do not tell us what those 15 "allegations of fact" are. Nor do they explain how they soundly defeat the City's summary judgment motion. We will. And they do not.

The 15 statements referred to by the Clouds in their brief direct the Court to the Record at 207D-F. (Cloud Br. at 16.) There the Court will find the Clouds' reply memorandum where they first identified these 15 statements. (R. 207D-F.) What the Court will not find, however, is what it will not find in the Clouds' brief: an explanation as to how a de novo review will provide the necessary direct counter to any of these 15 statements. "As the Utah Supreme Court has made clear, facts asserted in support of a motion for summary judgment remain undisputed "'[a]bsent a direct counter.'" *Wilkinson v. Washington City*, 2010 UT App 56, ¶ 8, 230 P.3d 136 (quoting *Johnson v. Hermes Assocs., Ltd.*, 2005 UT 82, ¶ 24, 128 P.3d 1151). Moreover, the Court will not find any explanation as to how any of these facts are within the City's "exclusive

knowledge or control," which is a necessary prerequisite to qualifying for Rule 56(f) relief, *Campbell, Maack & Sessions*, 2001 UT App 397, ¶ 9.

This is because these statements fall into one or more of four categories:

1. The Clouds' *own* deposition testimony;

2. The deposition testimony of expert witnesses for both parties (Reginald Edwards and Lee Scarlett for the Cloud; and Bradley Larson for the City);

3. The deposition testimony of City employees and officials, taken under examination and questioning from the Clouds' attorneys; and

4. Direct quotations from either the Fire Code itself or the Fire Board's decision. These statements merely state what the Fire Code provides or what the Fire Board held—not some deduction or disputable implication from these sources.

THE "15 STATEMENTS"

Note that the referenced paragraph numbers are those assigned by the City in its summary judgment motion. The citations are those utilized by the City in making these statements, in accordance with Utah R. Civ. P. 7(c)(3)(A).

¶13 Given the height of the warehouse area, Plaintiffs' intent (as evidenced by their actions) was to stack the vaults two to three high to maximize their warehouse space and, consequently, their profits. Cloud Dep. 42:16-20) (testifying on December 29, 2003, that Plaintiffs were "only" stacking the vaults "two high," because at the time they did not "even have enough to fill the floor up."); Edwards Dep. 74-75 (testifying that in January 2006 Plaintiffs were still utilizing their building as high-piled combustible storage because they had the vaults stacked two high in excess of 12-feet in height); Larson Dep. 19-20, Ex. 1 Inspection Report (testifying that, in September 2005, conditions were observed in the warehouse of storage between 14 and 16 feet in height); Fire Board Ruling, Finding of Fact ¶3 (finding: "Mrs. Cloud testified that the intended use of the building was for high pile storage. The building has been used for high pile storage and was properly designated as such on January 3, 2002.)

¶14 Stacked two-high, the vaults measure 14-feet in height. (Cloud Dep. 42:16-25, 43:1-3.)

¶17 Around the same time, the City requested that its fire chief, Dwayne Isom, inspect the building for fire code compliance. (Isom Dep. 9:23-25, 10, 11:1-8; see also Cloud Dep. 58-59.)

¶19 Chief Isom made the determination that Plaintiffs' intended use of their building constituted "high-piled combustible storage area" under section 8101.2.2 of the 1997 Uniform Fire Code. (Isom Dep. 43-58.)

¶20 The Uniform Fire Code defines "High-Piled Combustible Storage" as: "storage of combustible materials in closely packed piles or combustible materials on pallets, in racks or on shelves, where the top of the storage is greater than 12 feet (3658 mm) in height." 1997 Uniform Fire Code § 209-H.

¶21 Because Chief Isom determined that Plaintiffs' use constitutes a high-piled combustible storage area within the meaning of the fire code, and because the building is approximately 10,000 square feet in area, he determined that the fire code required Plaintiffs' building to have an automatic sprinkling system. (Isom Dep. 43:4-12.)

¶23 As a result, Chief Isom did not pass the building on its final inspection. (Isom Dep. 43:4-12.)

¶24 Because the building did not pass its final inspection, the City did not issue a final certificate of occupancy for the building. (Bulloch Dep. 17-22; see also Am. Compl. ¶46.)

¶25 The fire code provides for an additional option for high-piled storage in lieu of an automatic fire sprinkling system. This option—known as Option 2—requires installation of: (i) a compliant fire detection system; (ii) appropriate building access; (iii) a compliant smoke and removal system; (iv) curtain boards; and (v) small hose and valve stations. *See* 1997 Uniform Fire Code, Table 81-A (vol. I 1997).

¶26 Plaintiffs' building did not (and does not) have all of these items installed in lieu of a fire sprinkling system. (Edwards Dep. 46-48, 61-64; Larson Dep. 15:21-25, 16-28, & Ex. 1; Scarlett Dep. 36.)

¶33 Plaintiffs believe the decision to require an automatic fire sprinkling system in their building was the right decision. However, they take issue with the timing of the decision and the failure to include the fire chief in the approval and inspection process. (Cloud Dep. 74:10-22.)

¶53 The Board ultimately ruled that Plaintiffs' building was not in compliance with the fire code at the time of the January 3, 2002 inspection and therefore the City's "denial of a Certificate of Occupancy was based on a factually correct finding that the building was not in compliance with the 1997 Uniform Fire Code requirements." Fire Board Ruling at 3 ¶¶2, 7.

¶54 The Board also granted Plaintiffs a temporary certificate of occupancy for a one year period of time. *See* Fire Board Ruling at 4.

¶55 During this time period, Plaintiffs were required to keep their storage below 12-feet in height; store only certain commodities; post appropriate signage; and do what is necessary to come into compliance with the fire code, at which time they would receive a permanent certificate of occupancy. *See id.*

(R. 207D-F.)

With these statements in plain view, the Clouds' conclusory assertion that these statements are "directly affected" by a de novo review, and that the de novo review must take place before they can defend or prove up their contract and tort claims is a work of fiction. Are the Clouds suggesting that they will simply commit perjury at trial and change their sworn deposition testimony? Are they suggesting that at trial the provisions of the Uniform Fire Code will not state what they state now? And exactly which of these statements is within the City's "exclusive knowledge or control?" The answer is simple, none of them. To accept the Clouds' argument—and the trial court's order—would mean that Rule 56(f) can now be applied not only to allow for more time to conduct discovery and procure missing affidavits, but to avoid over seven years' worth of full discovery and depositions, including dodging a party's own sworn deposition testimony, so they can argue their case all over again at trial in the hopes that the facts and law will be different. That cannot be law.

These are the undisputed facts that were developed after full discovery and depositions. There is no possibility of the Clouds providing legitimate and direct counter to any of them. The Clouds' arguments merely confirm that the trial court's Rule 56(f) order "exceed[ed] 'the limits of reasonability.'" *Price Dev. Co. v. Orem City*, 2000 UT 26, ¶ 9, 995 P.2d 1237 (quoting *Crossland Sav.*, 877 P.2d at 1243).

III. THE DE NOVO REVIEW UNDER THE ADMINISTRATIVE PROCEDURES ACT IS IRRELEVANT TO THE CITY'S MOTION.

This case is not, as the Clouds argue, complex "in the extreme." The Clouds and the trial court have only made it appear so. And the Clouds' demand that the Court allow them to keep alive meritless and stillborn claims so they can have their de novo review is without merit as the de novo review is irrelevant to the Clouds' tort and contract claims. It is clear that the Clouds do not fully grasp the difference between the administrative procedures and the Immunity Act that forms the basis of the City's summary judgment motion.

A. The De Novo Review Has Nothing to do With the Tort and Contract Claims at Issue in the City's Summary Judgment Motion.

As detailed in the City's opening brief, the City has retained immunity from suit against the Clouds' tort claims. *See* Utah Code §§ 63-30-10(3), (4). The reasons for this immunity are anchored in the public safety, health, and welfare. *See DeBry v. Noble*, 889 P.2d 428 (Utah 1985). So, too, is the reason that building permits do not and cannot create contractual obligations. *See Heideman*, 2007 UT App 11. In short, the damages the Clouds seek for their tort and contract claims are not available to them. A de novo

review of the Fire Board's decision cannot change this fact. Rather, as explained in footnote 12 of our opening brief, no damages are available in a de novo review of an administrative appeal. *See* Utah Code § 63G-4-404(1)(a) (2008).

The only purpose for an administrative appeal is to determine if government erred in, for example, not granting a certificate of occupancy or other permit. In other words, it allows government the opportunity to correct its own errors. *See Holladay Town Center, LLC v. Holladay City*, 2008 UT App 301, ¶ 8, 192 P.3d 302. The remedy is purely equitable. For example, in this case it led the Fire Prevention Board to issue the certificate of occupancy with certain conditions. There is nothing exceptional or extraordinary about this process. And the Clouds' bald assertions that the City agrees with their claim about this being an amazingly complex and extraordinary case are just that—bald assertions that are not reflected in the record or reality.

In fact, if there is anything exceptional about this case it is that there were so many different appeals procedures available to the Clouds to obtain review of the City's decisions. But the Clouds never once bothered to timely invoke any of them. As the U.S. District Court explained:

> First, § 103.1.4 of the Uniform Fire Code establishes a board of appeals that could have interpreted the fire code and rendered a favorable decision to the Clouds in regards to Chief Isom's determinations. Nevertheless, the Clouds did not appeal to that body. Second, under Utah administrative law, "[i]f a city, county, or fire protecting district refuses to establish a method of appeals regarding a portion of the [fire code], the appealing party may petition to the [Utah Fire Prevention Board] to act as the board of appeals. Nevertheless, the Clouds did not appeal to that board. And last, in accordance with the Utah Municipal Land Use and Development Management Act, the Clouds could have appealed Chief Isom's decision to the Washington City Board of Adjustment, which as the authority to

> hear and decide appeals "where it is alleged that there is error in any order, requirement, decision or determination made by any administrative official in the enforcement of" the zoning ordinances. The Clouds do not dispute that they did not appeal to any of the available boards.

Cloud v. Washington City, No. 2:04-CV-00246 at 11-12 (D. Utah April 7, 2005).

The time for the Clouds to appeal to any of these agencies expired in late February 2002. *See* Utah Admin. Code R710-9-16.2, 16.3 (appeal must be filed within 20 days after receiving decision); Wash. City Zoning Ord. § 4-8 (appeal must be filed within 15 working days of the decision). It was only after the U.S. District Court remanded the state contract and tort claims back to the state trial court that the state trial court, sua sponte, decided to allow the Clouds a second chance to pursue an administrative appeal, long after the time period to do so had expired. This case would be over if the trial court had not allowed the Clouds to pursue a dead issue. *See, e.g., Meadowbrook, LLC v. Flower*, 959 P.2d 115, 119 (Utah 1998) ("The interests of justice are not enhanced when the court exceeds its role as arbiter by reaching out and deciding an issue that would otherwise be dead"). Thus, contrary to what the Clouds indicate in their brief, the City does not agree that the consolidation of the damages case with the de novo review was proper and necessary. In fact, the City has fought this procedure every step of the way.[3]

In any event, notwithstanding anything the Clouds have argued, their central theme that they are "entitled to a full and comprehensive review" (at 12) in an administrative proceeding under the Administrative Procedures Act is not, by any

[3] The City attempted an interlocutory appeal to this Court when the trial court allowed the belated appeal to the Fire Prevention Board. The Court denied that petition.

measure, a valid counter to the City's entitlement not to stand trial on the damages claims. To hold otherwise would allow any plaintiff to avoid the Immunity Act by simply pursuing both a damages and administrative appeal procedure and claiming that the two are related. The Court must reject that argument.

B. The Clouds' Jurisdictional Argument Makes No Sense.

The Clouds also posit a jurisdictional argument (at 17) that until the de novo review occurs "jurisdiction is absent to even address Washington City's summary judgment relief requested." (Cloud Br. at 17.) This is a fantastic assertion. The City's summary judgment motion attacks the claims the Clouds brought against the City. The Clouds, as the plaintiffs, are the masters of their complaint. They decided which claims they would bring against the City. Now, eight years in, in a brief before this Court, they want to claim that the City is precluded as a jurisdictional matter from defeating those claims on summary judgment.

It is true there is a jurisdictional issue here, but it bars the Clouds' tort claims. It does not bar the City from defending against those claims and arguing that they are barred under the Immunity Act.

Further, this is not an appeal of the Fire Prevention Board's decision. This is an appeal of the trial court's denial of the City's summary judgment motion which challenged the only claims that exist: The Clouds' contract and tort claims. This Court plainly has jurisdiction to review that denial. *See* Utah R. App. P. 5; Utah Code § 78A-4-103(2)(j).

C. The Clouds' "We Need to Ripen Federal Claims" Argument Has Nothing to Do with the Issues That Are Already Before the Court.

The Clouds also assert that they need their de novo review in order to ripen and reassert their federal claims. (Cloud Br. at 18-19.) This argument is also without merit.

Here, we could respond that the federal claims will never ripen and that the trial court's decision to allow the administrative appeals procedure in the first instance was erroneous.[4] We could argue that the Clouds have no chance at recovery because of their own failures to pursue obvious administrative remedies. *See, e.g., Holladay Town Center, LLC*, 2008 UT App 301, ¶ 8 (holding that a party cannot turn its failure to pursue administrative remedies "into a triumph" by skipping those procedures intended to allow government to correct its own errors). But arguing over claims that are not even before the Court is a purely hypothetical exercise that has no place in this appeal. Indeed, the purpose of the ripeness doctrine is to ensure that courts do not get involved in rendering advisory opinions on hypothetical questions. *See Redwood Gym v. Salt Lake County Comm'n*, 624 P.2d 1138, 1148 (Utah 1981); *Carter v. Lehi City*, 2012 UT 2, ¶¶ 92-93, 269 P.3d 141.

The Clouds' ripeness argument simply underscores why summary judgment should be granted to the City. Instead of defending the claims that are before the Court, the Clouds ignore them entirely but ask the Court to let them keep the claims alive so that, some point in the future, they can bring a new complaint asserting new claims.

---

[4] Those arguments are set forth in our objection to the state trial court's order sending this case onto the administrative appeals track. See R. 164-164R.

Quite simply, the Clouds' ripeness argument is without merit and presents no basis to affirm the trial court's order.

IV. JUDICIAL ECONOMY DOES NOT DISPLACE JURISDICTION AND IMMUNITY PROBLEMS.

Finally, against the jurisdictional, immunity, and public health, safety, and welfare reasons that mandate judgment for the City, the Clouds respond with a judicial economy argument. Judicial economy is no basis for a trial court to retain jurisdiction over claims for which it has no jurisdiction; force the City to go to trial on claims for which it is immune and has a right not to stand trial; and refuse to apply and enforce this Court's precedents.

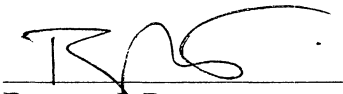
Furthermore, the judicial economy argument makes no sense. How is having a trial to review de novo the Fire Prevention Board's decision, followed by a trial to determine damages on the tort and contract claims, followed by a new complaint and pleading asserting new claims that have (according to the Clouds) now ripened, in the interests of judicial economy? The Clouds can sling whatever accusations and insinuations they want concerning the City's summary judgment motion. (Cloud Br. at 20) (asserting that the City must be "apprehensive" about the trial de novo.) It does not change the fact that the City is entitled to summary judgment, here and now, on the only claims that exist: the tort and contract claims arising out of and resulting from the City's fire code inspection and non-issuance of a certificate of occupancy.

CONCLUSION

For the reasons set forth above and in our opening brief, the trial court's order should be reversed and the matter remanded with instructions to the trial court to enter judgment for the City on all damages claims asserted in the case.

DATED THIS 19th day of March 2012.

DURHAM JONES & PINEGAR, P.C.



BRYAN J. PATTISON
Attorneys for Washington City

CERTIFICATE OF COMPLIANCE

WITH RULE 24(f)(1)

This brief complies with the type-volume limitation of UTAH R. APP. P. 24(f)(1) because:

1. According to the word processing program used to prepare this brief (Word 2007), this brief contains 6,268 words, excluding the parts of the brief exempted by UTAH R. APP. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of UTAH R. APP. P. 27(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in a 13-point Times New Roman font.

Dated: March 19, 2012

BRYAN J. PATTISON
Attorney for Appellants

CERTIFICATE OF SERVICE

In accordance with UTAH R. APP. P. 26(b), I, Bryan J. Pattison, certify that on March 19, 2012, I caused two (2) copies of the **REPLY BRIEF FOR APPELLANTS**, to be served upon counsel for Appellees in this matter, via first class mail with sufficient postage prepaid, to the following address:

Justin D. Heideman
Heideman McKay Hugely & Olson, LLC
2696 North University Avenue, Suite 180
Provo, Utah 84604
Attorneys for Appellees

BRYAN J. PATTISON